SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 119

FEDERAL COMMUNICATIONS COMMISSION,
Appellant,

vs.

COLUMBIA BROADCASTING SYSTEM, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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Appellee, Columbia Broadcasting System, Inc., pursuant to Paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States, moves that the judgment of the statutory three-judge District Court be affirmed.

Supplementary Statement of Facts

This action and the administrative proceedings giving rise thereto are generally described in the Statement as to Jurisdiction filed by the Federal Communications Commission (hereinafter referred to as the "Commission"). Appellee desires only to supplement the Commission's state-

ment of facts in order that the nature of the Commission's action as well as the grounding of the decision of the District Court below may be somewhat more fully revealed.

A. *The Commission's Report and Order.*—The Commission Rules here involved, relating to so-called quiz-giveaway radio and television programs, were adopted on August 18, 1949, pursuant to a Report and Order of the Commission which is reported in 1 Pike & Fischer R. R. (Part 3) 91:231. The Report and Order and Rules were adopted by three of the seven members of the Commission; one of the Commissioners dissented and three did not participate.

The majority of three, in their Report, explicitly state that the Rules promulgated rest exclusively on such statutory authority as may be drawn from Section 1304 of the Criminal Code which provides:

> "§ 1304. Broadcasting lottery information
>
> "Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> "Each day's broadcasting shall constitute a separate offense."

Thus, the initial paragraph of the Report states that the Rules attached thereto

> "set forth for the guidance of all broadcast licensees and other interested persons the Commission's interpretation of Section 1304 of the United States Criminal Code (18 U. S. C. 1304) prohibiting the broadcast of

any lottery, gift enterprise, or similar scheme which the Commission intends to follow in licensing proceedings in determining whether an applicant for a station license or renewal thereof is qualified to operate his station in the public interest."

The sole question which the Commission is presenting on this appeal is whether "consideration", which the cases say is an essential element of a lottery, is correctly defined in the Commission's Rules.

It is the theory of the Commission's Rules that since a person is not likely to be in a position to answer questions unless he listens to or views a program, he will do so, i.e., listen to, or view, it, and that this constitutes consideration for the purposes of the lottery laws.

The Commission states in its Report:

"• • • We take official notice of the fact that one of the most important factors in securing sponsors for radio time is the number of people who probably or actually listen to the station's programs, as determined by listener surveys and other means. Therefore, especially when the listener has available a choice of services, the licensee seeks to attract the listener to create 'circulation' as a basis for the sale of radio time, and the sponsor seeks to attract the listener so that the sponsor's advertising message may be delivered and the listener induced to purchase the sponsor's product or service.

"• • • Where such a scheme is designed to induce members of the public to listen to the program and be at home available for selection as a winner or possible winner, there results a detriment to those who are so induced to listen when they are under no duty to do so. And this detriment to the members of the public results in a benefit to the licensee who sells the radio time and 'circulation' to the sponsor, and to the sponsor as well, who presents his advertising to the audi-

> ence secured by means of the scheme. When considered in its entirety, a scheme involving award of prizes designed to induce persons to listen to the particular program, certainly involves consideration furnished directly or indirectly by members of the public who are induced to listen."

Under the Commission's Rules, quiz-giveaway programs are lotteries even though no member of the public is induced to stake any sums of money or anything of value on the promise that he will be given a chance to participate in the contest.

The Report thus states:

> "that a scheme may come within the scope of the statutory prohibition, which offers prizes dependent upon lot or chance even where the participants in the schemes are not risking the loss of any money through their participation."

The dissenting Commissioner, however, pointed out that

> "The concept of 'lottery' has a long legal history. This provision, or ones similar thereto, appear in the statutes of virtually every state, and have frequently been applied by both federal and state courts. It is quite evident from the report of the majority in this proceeding that the Commission's interpretation of the term 'lottery' is novel in at least one respect. • • • Our Proposed Rules would comprehend situations in which none of the participants risked anything of value.
>
> "I do not believe it proper for an administrative agency to broaden the interpretation of a criminal statute any further than has been done by the courts. • • •"

The Commission's Report states that the validity of the Rules is to be determined only by whether they correctly set forth the elements of a "lottery" within the meaning of Section 1304 and not by whether they correctly set forth

what is proscribed by the words "or similar schemes" in that section of the Criminal Code. The Report states:

> "* * * For the purposes of considering whether the rules before us are a proper interpretation of the statute, it is unnecessary to resolve the question of the extent to which the statutory terms 'gift enterprises or similar scheme' may include more than the statutory term 'lotteries'. * * * Since the proposed rules all deal with situations which contain in some manner all of the three elements of prize, chance, and some form of consideration, which have been held by the courts to be the essential features of lotteries, it is unnecessary to resolve the open question of whether the statutory terms are intended to cover a wider area."[1]

B. *The decision of the District Court.*—The opinion of the three-judge District Court which led to the judgment from which the Commission is here appealing is reported in 110 F. Supp. 374. In that opinion, the majority of the District Court (Judges Leibell and Weinfeld) held that "the act of listening to a broadcast of a 'give-away' program, or viewing it on television, does not constitute a 'price' or 'valuable consideration', which is an essential element of a 'lottery'." 110 F. Supp. at 385. It pointed out (110 F. Supp. at 384, 386, 388) that:

> "Besides the offer of a prize, and the presence of the element of chance in selecting some of the participants who will contest for the prize, it must also be shown,

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[1] The validity of the Commission's Rules must be judged on the basis of whether they correctly meet the test of consideration enunciated in the cases. This was recognized by the Commission itself in its Report (p. 4) wherein it stated:

> ". . . interpretative rules are controlling in any court review only to the extent that they are found by a reviewing court to embody a proper interpretation of the law they purport to interpret. . . ."

If, therefore, the Rules do not correctly interpret Section 1304, they are illegal and void. See, *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87; *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140.

in order to constitute a lottery, that a price, something of value, is furnished by at least some of the participants. * * *"

* * * * * * *

"It is not the value of the listening participants to the station or sponsor that is the valuable consideration contemplated by the lottery statute. It is the value to the participant of what he gives that must be weighed. What do the prospective participants give? The Commission argues that it is a 'legal detriment' to the listener or viewer to sit at home listening to the program and awaiting a telephone call from those in charge of the contest. Technically, and applying the law of contracts, that may be true. But that is not sufficient where a lottery statute, a criminal statute, is involved. The alleged legal detriment to the radio listener is not the kind of a 'price' or 'thing of value' paid by a participant in a lottery, which the law contemplates as an essential element of a lottery. * * *"

"The danger of 'impoverishment' to the participants and the development in them of a 'gambling spirit' have been mentioned in some of the earlier cases as the evils of a lottery. The leading case on lotteries, Horner v. United States, 147 U. S. 449, 13 S. Ct. 409, 37 L. Ed. 237, quotes from decisions and state laws against lotteries, and cites the 'pernicious tendencies' which the State laws were designed to prevent. I fail to see anything akin to those evils imperiling the invisible radio and television audience who listen and view the type of program condemned by subdivisions (2), (3) and (4) of paragraph (b) of the Commission's Rules. Those programs cannot be classed as a 'reprehensible type of gambling activity which it was paramount in the congressional mind to forbid'. (See Report of the House of Representatives Committee on Section 1305 of the United States Criminal Code, referred to in footnote No. 2 above.)" [Case citations omitted]

The Question Raised by Appellant Is Not Substantial

1. It is a fact of the utmost significance in this case that the United States, though a defendant in this action, has not joined in the Commission's appeal. For this is not simply a case in which the failure of the Department of Justice to join in the appeal of an administrative agency may connote only doubts as to the importance of the question presented or skepticism as to the correctness of the agency's factual findings. This is a case in which the Commission's appeal raises a bare legal question with respect to a federal criminal statute whose implementation and enforcement is the primary responsibility of the Department of Justice.

In such a case, the views of the Department of Justice are a matter of prime importance. See, *e.g., United States* v. *Alabama Great Southern Ry. Co.*, 142 U. S. 615, 621; *Boutell* v. *Walling*, 327 U. S. 463, 470-471. And, in this case, there is virtually no reason to doubt that the failure of the United States to join with the Commission on this appeal can only mean that, upon full consideration, the Solicitor General has concluded that the Department should adhere to its long-standing view, evidenced by its repeated refusals to invoke Section 1304 against programs such as those here involved (which refusals are hereinafter adverted to), that these programs are not lotteries within the meaning of that penal provision.

The fact is that quiz-giveaway programs similar to those involved in this case were broadcast for a decade, prior to the promulgation of the Rules in 1949, to the knowledge of the Commission. During that period, the licenses of literally thousands of stations, including those owned by appellee, were renewed by the Commission with knowledge of the past broadcast of such programs by stations and that they intended to continue the broadcast thereof.[2]

[2] See paragraph Seventeenth of the complaint which is admitted by the answer.

During that same decade the Commission made requests to the Department of Justice to prosecute the broadcast of such programs as violations of the lottery laws. The Department of Justice, however, refused to prosecute.

The Post Office Department ruled that such programs did not constitute lotteries and therefore accepted literature relating thereto for transmittal through the mails.

So also, the Commission attempted to induce Congress to pass legislation specifically prohibiting this type of program but the Interstate Commerce Committee of the Senate, to which the Commission addressed its request, took no action.

The District Court adverted to the foregoing facts when it stated (110 F. Supp. at 388):

> "In the legal opinions given by the United States Attorney General to the Commission in 1940 the type of program now condemned by the Commission's Rules as a lottery was held not to be covered by Section 316 of the Federal Communications Act (now § 1304 of the Criminal Code.) [See Exhibits E, F, G, H, I and J annexed to the American Broadcasting Company's affidavit herein.] The Commission thereupon sought to have the Congress specifically prohibit this type of program and wrote Senator Wheeler on December 30, 1943. [See Exhibit 'D' annexed to the American Broadcasting affidavit.] The Interstate Commerce Committee of the Senate (of which Senator Wheeler was Chairman) took no action on Chairman Fly's request."

It is submitted that there is no ground for this Court's putting an interpretation on Section 1304 which the Attorney General has refused to put upon it and which Congress has failed to incorporate in legislation pressed upon it by the Commission.

2. The crucial fact is that no case holds that consideration for purposes of the lottery laws, federal or state, is supplied by merely listening to or viewing a radio or a tele-

vision program. There is no conflict between the holding below and any other decision on this issue.

Indeed there is no judicial decision involving any federal law relating to lotteries which contradicts the rationale of the court below; that the requirement of consideration is met only when contestants directly or indirectly pay money or a like thing of value in return for the opportunity to compete. Every judicial determination as to the meaning of the federal law which we have been able to find accords with the view of the court below. *Post Publishing Co.* v. *Murray,* 230 Fed. 773 (C. A. 1), certiorari denied, 241 U. S. 675; *Garden City Chamber of Commerce* v. *Wagner,* 100 F. Supp. 769 (S. D. N. Y.), stay denied, 192 F. 2d 240 (C. A. 2). The only cases involving federal law which are relied upon in the Commission's Report and in its Statement as to Jurisdiction are *Horner* v. *United States,* 147 U. S. 449; *Brooklyn Daily Eagle* v. *Voorhies,* 181 Fed. 579 (C. C. E. D. N. Y.) and *Affiliated Enterprises* v. *Gantz,* 86 F. 2d 597, 599 (C. A. 10).

In *Horner,* however, each participant was required to buy a bond in order to be eligible for the prize. And in the *Brooklyn Daily Eagle* case, contestants in an essay contest could compete only if they submitted labels cut from containers of a specified breakfast food. Hence, the expenditure of moneys for the purchase of the breakfast food was a condition on the right to compete for the prize. *Gantz,* a "Bank Night" case, did not involve federal law. It is not, moreover, in conflict with the decision below as a reading of the opinion in that case will demonstrate. In that case consideration was found to exist because members of the public were induced to expend moneys for admission to a theatre in order to compete for a prize.

3. Judge Clark's dissent below advocates an extremely expansive reading of Section 1304. It ignores the fact that

what is here involved is the interpretation of a penal law which this Court has held must be strictly construed. *France* v. *United States,* 164 U. S. 676, 682-683. It also ignores the basis of the Commission's decision—that the programs here involved fall within the term "lottery" in Section 1304—and seeks, rather, to support the Rules on the ground, explicitly disavowed by the Commission, that if these programs are not lotteries they are, in any event, a "similar scheme". It is significant, too, that the views expressed in Judge Clark's dissent are contrary to those of a majority of his brethren on the Court of Appeals for the Second Circuit in *Garden City Chamber of Commerce* v. *Wagner,* 192 F. 2d 240, denying stay on the basis of the opinion in 100 F. Supp. 769 (E.D. N.Y.), Judge Clark dissenting.

Judge Clark's approach to this case is squarely inconsistent with that taken by this Court in comparable circumstances. He points out (110 F. Supp. at 393) that the Rules here involved fall within that class of instances in which governments or their agents attempt "to enforce moral precepts which to a large part of the community seem strange and excessively puritanical". But he asserts that, nevertheless, the prohibition, being understandable, should be enforced.

We submit, however, that the proper approach here must be that taken by this Court in *Hannegan* v. *Esquire, Inc.,* 327 U. S. 146. In that case, this Court said (327 U. S. at 156, 157-158):

> "The provisions of the [statute] would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country. * * * Under our system of Government there is an accommodation for the widest variety of tastes

> and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. * * * What seems to one to be trash may have for others fleeting or even enduring values. * * *"

We strongly urge that there is no warrant for extending the concept of "consideration" embodied in a penal statute in order to convert what is essentially a matter of taste into a crime. The Attorney General has refused to do this, and Congress has failed to act on the Commission's request for remedial legislation. Whether the problem created by programs falling within the Rules set aside by the court below warrants criminal sanctions is a question which should be squarely faced and decided by Congress before those sanctions are allowed to attach.

4. The purposes of the lottery laws and the evils at which they are directed are stated succinctly in the opinion of this Court in *Phalen* v. *Virginia,* 8 How. (U. S.) 162 at 167-8, as follows:

> "The suppression of nuisances injurious to public health or morality is among the most important duties of government. Experience has shown that the common forms of *gambling* are comparatively innocuous when placed in contrast with the widespread pestilence of *lotteries.* The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; *it preys upon the hard earnings of the poor; it plunders the ignorant and simple."* [Emphasis ours]

Other cases holding that the vice of lotteries is that by appeal to cupidity they lure members of the public to improvidence, are *Douglas* v. *Kentucky,* 168 U. S. 488 (1897); *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342; *Public Clearing House* v. *Coyne,* 194 U. S. 497.

The lottery laws are aimed at the suppression of schemes which constitute an evil in that they lead to improvidence by, and impoverishment of, the public.

There is no contention, however, that the programs here involved are so injurious to the public or that they are otherwise evil. Thus, the amended complaint alleges as a fact (Complaint, Thirteenth) and defendants by stipulation (Stipulation, par. 1) have admitted that:

> "The Commission has made no finding of fact that said programs * * * have had a demoralizing or other deleterious, harmful or evil effect on the public."

In these circumstances, this Court should not be the first to permit a lottery statute to be applied to a matter wholly different from those it was intended to reach.

Prayer for Affirmance

For the foregoing reasons, it is evident that no substantial question is raised by the Commission's appeal. The judgment of the District Court should, therefore, be affirmed.

Respectfully submitted,

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